UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	06 Cr. 982 (BSJ)
MICHAEL ANNUCCI, a/k/a "Mickey Annucci,"	**Opinion & Order**
Defendant.	

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

On September 29, 2006, Defendant Michael Annucci ("Defendant" or "Annucci") was arrested on a warrant issued upon a Complaint. On February 14, 2007, Defendant was indicted on a four-count Superseding Indictment charging him as follows. Count One charges Defendant with conspiracy, in violation of Title 18, United States Code, Section 371. Count Two charges Defendant with aiding and abetting the embezzlement of monies from employee benefit plans in violation of Title 18, United States Code, Sections 664 and 2. Count Two alleges that Defendant "participated in a scheme whereby he submitted false shop steward reports that underreported the hours worked by carpenters for a company named L&D Installers ("L&D"). Count Three charges Defendant with wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2. Count Four charges Defendant with unlawful receipt of payments by a union official,

in violation of Title 29, United States Code, Section 186(a)(1), (b)(1), and (d)(2). Before the Court are Defendant's motions to suppress his post-arrest statements and to dismiss Count Two of the Indictment on the ground that the allegedly delinquent employer contributions cannot be the subject of an embezzlement charge. For the reasons set forth below Defendant's motions are DENIED.

Background

The Court held a suppression hearing regarding Defendant's arrest and his post-arrest statements on March 20, 2007. At the hearing three of the agents who participated in the arrest testified: Agent Ryan Gibbs, Agent Marcus Rivera, and Agent Stephen Donnelly. Defendant did not testify at the hearing but he submitted a sworn affidavit that described his version of the events. The Court finds the agents' testimony credible and credits their testimony. The following facts are drawn from the agents' accounts of the events that occurred on that day and represent the Court's findings of facts.

Defendant was arrested at his home located at 4 Reta Lane, Port Monmouth, New Jersey on the morning of September 29, 2006. (Mar. 20, 2007 Hr'g Tr. (hereinafter "Hr'g Tr.") 3:24-4:1.) The arrest team was made up of six agents from the Department of Labor: Agent Ryan Gibbs, Agent Marcus Rivera, Agent Stephen Donnelly, Agent Jonathan Malone, Agent James Woods, and Agent

Tina Seisis. (Id. at 4:7-14.) The agents arrived at Defendant's residence at approximately 6:00AM (Id. 4:2-4), and waited in their two vehicles for approximately 40 minutes (Id. 4:21-22). At approximately 6:40AM, Agents Rivera, Donnelly, and Gibbs approached Defendant's home and knocked on the door. (Id. 5:5-8.) The Defendant answered the door, and the agents identified themselves. (Id. 5:8-14.) The agents explained to Defendant that they "wanted to speak with him regarding some work he had done as shop steward at the 11 Madison job site." (Id.) Defendant indicated that he did not want to speak to the agents and attempted to close the door. (Id. 5:15-17.) Agent Rivera prevented Defendant from closing the door and informed him that the agents had a warrant for his arrest. (Id. 5:18-20.) Agents Rivera, Donnelly, and Gibbs then entered Defendant's residence and showed him the arrest warrant. (Id. 5:21-24.) The agents told Defendant that they would like to speak with him and asked if there was somewhere where they could talk. (Id. 5:25-6:3.) Agent Gibbs and Defendant then "stepped down several steps into what appeared to be the basement" and sat down in a seating area. (Id. 6:2-6.) Agent Gibbs then "pitched" Defendant. (Id.) During the "pitch," Agent Gibbs told Defendant that they "just wanted him to listen," and informed Defendant of the investigation the Department of Labor had conducted and the incriminating evidence they had obtained

against him. (See id. 6:7-12.) Agent Gibbs attempted to get Defendant to cooperate. In response, Defendant "said something to the effect of 'Fuck off. I'm not cooperating with you. And I want to talk to my attorney.'" (Id. 6:13-16, 52:19-21.) Agent Gibbs ceased talking to Defendant, began escorting Defendant upstairs so he could get dressed (Id. 6:24-7:5), and called in the other agents to perform a security sweep (Id. 6:20-23). The pitch took approximately "three to five minutes." (Id. 34:16-18.) On his way up the stairs, Defendant met his wife, and instructed her to call his attorney. (Id. 6:24-7:1.) Agents Gibbs, Donnelly, and Rivera, then took Defendant to his room to get dressed. (Id. 7:2-5.) While Defendant was getting dressed, the agents asked Defendant where his clothing was located, if he had any shoes without laces, and if he was going to need any medication for the next 24 hours or so. (Id. 7:6-13.) When Agent Donnelly handed Defendant a shirt from his wardrobe, which turned out to be a union-logo shirt, Defendant asked for a different shirt, and the agents gave the Defendant another shirt. (Id. 8:5-12.) While he was dressing, the agents did not ask Defendant any questions about his conduct as a shop steward (Id. 7:21-24), nor was there any discussion about the underlying charges against Defendant (Id. 7:25-8:2).

At approximately 6:55AM, the agents took Defendant out of his residence (Id. 8:18-20), placed him in their vehicle, and

handcuffed him (Id. 8:25-9:2). Defendant told the agents that he had a shoulder injury and could not put his hands behind his back, so to accommodate his injury the agents handcuffed Defendant with his hands in front of his chest. (Id. 9:4-9.) Approximately two to three minutes after pulling out of Defendant's driveway, Agent Gibbs read Defendant his Miranda warnings in English from a pre-printed sheet. (Id. 10:7-19.) While reading the Miranda warnings, Agent Gibbs stuttered on one sentence and Defendant remarked, in substance, that the agent "didn't know how to read" and that he thought the agent "would be better at this." (Id. 10:22-11:2.) Agent Gibbs recorded the time and date the warnings were given on the Miranda sheet. (Id. 35:24-36:5.) The agents asked Defendant for directions out of his residential development to the Garden State Parkway. (Id. 54:3-7.) Defendant gave the agents directions and they proceeded north to the Garden State Parkway. (Id. 54:7-9.)

The car ride from Defendant's home to the Department of Labor office located at 201 Varick Street, New York, New York, took approximately two hours. (Id. 9:14-17, 11:9-11.) Almost immediately into the car trip, Defendant began talking. (Id. 12:5-9.) All of Defendant's statements were unsolicited. (Id. 12:21-24.) Defendant spoke about his life experiences, his Puerto Rican ancestry, his childhood, and his upbringing. (Id. 12:10-20.) Defendant also made statements about other union

officials. (Id. 13:12-23.) He stated that Gary DeMaria, one of the owners of L&D installers who has since passed away, was in hell for what he did. (Id. 14:3-5.) In response to Defendant's statements, Agent Rivera reminded Defendant that he had the right to remain silent and told him he should use it. (Id. 14:6-9.)

Defendant continued to speak and proceeded to make incriminating statements. (Id. 18:7-12.) Defendant asked Agent Gibbs what type of evidence they had against him. (Id. 16:4-7.) Agent Gibbs told Defendant that he had interviewed several carpenters who stated that they worked at Defendant's job site and were left off the "sheet" -- the shop steward report. (Id. 16:4-15.) Agent Gibbs also told Defendant that he had compared Defendant's shop steward reports with L&D timesheets for the 11 Madison jobsite and the two did not match. (Id.) In response, Defendant said "he had to do it; he had to leave guys off the sheet or he would have lost his job" (id. 13:1-3); that "he had to play ball" (id. 15:24-16:1, 55:13-14). Agent Gibbs followed up by asking Defendant what he meant by having to do it. (Id. 16:20-23.) Defendant did not respond. (Id. 16:24-25.) Upon hearing the statements made by Defendant, Agent Gibbs made a note on an envelope he had in the front of the car and recorded the time the statements were made. (Id. 17:18-20, 32:2-3.)

In the course of the car ride, Defendant also posed questions to the agent. Defendant asked Agent Gibbs several times if the Agent had been in the military. (Id. 14:12-14.) Initially, Agent Gibbs offered no response, but subsequently told him he was not. (Id. 14:13-14.) Defendant also asked Agent Gibbs what type of cooperation the agents were seeking. (Id. 14:15-17.) In response, Agent Gibbs told Defendant that they would be interested in information about any union officials or other individuals whom Defendant knew were engaged in criminal activities. (Id. 14:13-24.) Agent Gibbs named specific individuals, such as business agent William Hanley from Local 157. (Id. 14:24-15:3.) In response, Defendant told Agent Gibbs, in substance, that the agent needed to get his facts straight because Fred Kennedy is the business agent, not William Hanley.

The agents initiated a conversation with Defendant only twice during the car ride. The first conversation took place almost immediately after departing from Defendant's residence when the agents asked Defendant for directions out of his residential development. The second conversation initiated by the agents took place approximately forty minutes into the ride when the agents stopped at a rest stop. (Id. 11:12-17.) The agents asked Defendant if he needed to use the rest room and if he wanted anything to eat or drink. (Id. 11:18-23.) In

response, Defendant declined to use the restroom but requested a cup of coffee and told the agents how he would like his coffee. (Id. 11:24-12-2.)

The agents and Defendant arrived at the Department of Labor's offices at approximately 8:55AM. (Id. 19:4-6.) As they approached the offices, Agent Rivera read Defendant his Miranda warnings again from a pre-printed card. (Id. 57:22-58:5.) Agent Rivera read the warnings in English, and in response, Defendant said that he did not understand English, even though he had been speaking in English the entire car ride. (Id. 58: 4-6.) Agent Rivera then read the Miranda warnings in Spanish (id. 58:6-8), and Defendant commented that Agent Rivera's Spanish was "pretty good" (id. 58:8). Defendant was then brought into the Department of Labor offices to be processed. (Id. 19:22-23.) After processing, Defendant was taken to the intake unit of the Marshal's Service in the Southern District. (Id. 20:13-15.)

Discussion

I. Defendant's Motion to Suppress Post-Arrest Statements

Defendant Annucci moves to suppress all of his post-arrest statements on the ground that the agents violated his Fifth and Sixth Amendment rights by trying to "lure" him into conversation, and by making continued efforts to obtain his

cooperation after he invoked his right to counsel and right to remain silent. (Def. Mem. at 11-12.)

A. There was no Sixth Amendment Violation.

Defendant's claim of a Sixth Amendment violation is without merit. The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against" a defendant. United States v. Smith, 778 F.2d 925, 932 (2d Cir. 1985) (quoting Kirby v. Illinois, 406 U.S. 682, 688 (1972)). "The instances in which the initiation of adversary judicial proceedings have been found to give rise to a sixth amendment right to counsel include 'formal charge, preliminary hearing, indictment, information, or arraignment.'" Id. (quoting Kirby, 406 U.S. at 689). However, the Supreme Court "has never held that the sixth amendment right to counsel attaches at the time of arrest." Id. (citing United States v. Gouveia, 467 U.S. 180 (1984)). Moreover, the Second Circuit has held that the Sixth Amendment right to counsel does not attach at the time of arrest upon on a warrant supported by a complaint. Unites States v. Duvall, 537 F.2d 15, 22 (2d Cir. 1976). "Where a defendant has been arrested on a warrant but not yet indicted, the Sixth Amendment right attaches upon the defendant being arraigned." United States v. Reich, No. 04 Cr. 257, 2005 WL 524553, at *3 (E.D.N.Y. Jan. 27, 2005). Annucci made the statements at issue after his arrest but prior to being

presented before a magistrate for arraignment. Thus, the Sixth Amendment right to counsel had not yet attached, and Defendant cannot claim violation of that right.

B. There was no Fifth Amendment Violation

In support of his motion to suppress his post-arrest statements, Defendant argues that the agents violated his Fifth Amendment right against compelled self-incrimination by making continued efforts to obtain his cooperation after Defendant invoked his right to counsel and his right to remain silent. (Def. Mem. at 11-12.)

1. Defendant's Statements Were Not Obtained in Violation of His Fifth Amendment Right to Counsel

In Miranda v. Arizona, the Supreme Court held that the Fifth Amendment privilege against compelled self-incrimination requires that the defendant be advised of his right to remain silent and to the presence of an attorney prior to custodial interrogation. 384 U.S. 436, 444-45 (1966). When an accused invokes "his right to have counsel present during custodial interrogation," "he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." Edwards v. Arizona, 251 U.S. 477, 484-85 (1981). "The remedy for a Miranda violation is the exclusion from evidence of any ensuing self-

incriminating statements." Neighbor v. Covert, 68 F.3d 1508, 1510 (2d Cir. 1995). However, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not barred by [the Court's] holding" in Miranda. Miranda, 384 U.S. at 478.

The Court notes at the outset that the protections of Miranda "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (emphasis added). Thus, Defendant's claim turns on whether his incriminating statements were the product of "custodial interrogation." The Government contends that Defendant's incriminating statements were volunteered and should not be suppressed. The Government has the burden of proving by a preponderance of the evidence that a defendant made his statements spontaneously and not as the result of custodial interrogation. See United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991).

"Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 251 U.S. at 444. Interrogation is not limited to "those police interrogation practices that involve express questioning of a defendant while in custody."

Innis, 466 U.S. at 298. Instead, the act of "interrogation" encompasses "express questioning or its functional equivalent," that is "any words or actions" on the part of law enforcement agents that "were reasonably likely to elicit an incriminating response." Id. "[T]his is not to say . . . that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." Id. at 299. "Interrogation . . . must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. at 300. In determining, whether the conduct at issue constituted interrogation, the Court is to consider "the totality of the circumstances of the agents' conduct." United States v. Cota, 953 F.2d 753, 758 (2d Cir. 1992).

In reviewing the circumstances leading to Annucci's statements, the Court finds that Defendant's Fifth Amendment right to counsel was fully respected. Upon entering Defendant's home Agent Gibbs told Defendant to "just listen," and proceeded to inform Defendant of the investigation conducted by the Department of Labor and the incriminating evidence that was obtained against him. Agent Gibbs asked Defendant to cooperate. In response, Defendant "said something to the effect of 'Fuck off. I'm not cooperating with you. And I want to talk to my attorney.'" (Hr'g Tr. 6:13-16, 52:19-21.) Whereupon, Agent Gibbs ceased the questioning and proceeded to take Defendant to

his room so he could dress. While Defendant was dressing, the agents did not ask Defendant any questions about his conduct as a shop steward (Hr'g Tr. 7:21-24), nor was there any discussion about the underlying charges against Defendant (Hr'g Tr. 7:25-8:2).

Once Defendant invoked his right to counsel, the agents initiated three conversations with Defendant –- all of which were unrelated to the charges against him. The first conversation took place when the agents brought Defendant to his bedroom to dress and asked Defendant where his clothing was located, if he had any shoes without laces, and if he was going to need any medication for the next twenty-four hours. The next time the agents asked the Defendant a question, was upon leaving his residence when the agents asked for directions to the Garden State Parkway. The third conversation took place at the rest stop when the agents asked Defendant if he needed to use the restroom or wanted coffee. None of these questions "were reasonably likely to elicit an incriminating response," Innis, 466 U.S. at 298, and as such they do not amount to "custodial interrogation."

According to the testimony of the three agents, the incriminating statements made by Defendant in the car were unsolicited (See Hr'g Tr. 12:21-24, 58:15-17) – and I credit this testimony. During the car ride, Agent Gibbs did not try to

pitch Defendant to cooperate. (Id. 15:12-17.) Nor did the agents initiate a conversation with Defendant (Id. 18:20-25) or discuss Defendant's case (Id. 19:1-3). Therefore, I find that the agents did not solicit or "lure" Defendant into conversation.

The conversation that preceded Defendant's incriminating statement was initiated by the Defendant himself. Defendant asked Agent Gibbs what type of evidence they had against him (id. 15:4-7), and Agent Gibbs told Defendant that he had interviewed several carpenters who stated that they worked at Defendant's job site and were left off the "sheet" -- the shop steward report (id. 16:4-15), and that he had compared Defendant's shop steward reports with L&D timesheets for the 11 Madison jobsite and the two did not match (id.). In responding and describing the evidence that the investigation had produced, Agent Gibbs "did not engage in express questioning or its 'functional equivalent.'" See United States v. Cota, 953 F.2d 753, 759 (2d Cir. 1992). As held by the Second Circuit in United States v. Guido, an "officer's responses to [defendant's] questions, even when viewed in light of the earlier suggestion that he cooperate, do not amount to interrogation." 704 F.2d 675, 678 (2d Cir. 1983); see also United States v. Cota, 953 F.2d at 759 ("Where an agent 'supplied [the defendant] with general information regarding the crime [s]he was suspected of

committing, in response to [his] own questions,' voluntary statements made by a suspects who understands [his] rights are not prohibited."). Absent such interrogation there is no infringement of Defendant's Fifth Amendment right to counsel. See Edwards, 451 U.S. at 486. Accordingly, the Court finds that Defendant's incriminating statements were voluntary and not the product of interrogation and therefore will not be suppressed.

The Government concedes that Agent Gibbs's follow-up question to Defendant's incriminating statements, i.e. what did Defendant mean by "playing ball," constituted interrogation. (Government's Mem. at 13 n.2.) However, the Government does not seek to admit any statements made by Defendant after Gibbs posed the question. Accordingly, the follow-up question is not relevant to the Court's conclusion that Defendant's prior incriminating statements, which were the result of a conversation initiated by the Defendant, were volunteered and not the product of custodial interrogation.

Lastly, the Court notes that there is no evidence that Defendant was so overborne or intimidated that his volunteered statements should be rendered inadmissible. (See Hr'g Tr. 56:14-16.) There is no evidence that the manner of the arrest was deliberately public or coercive. The agents waited until Defendant was in the car to handcuff him, and accommodated his shoulder pain by cuffing his hand in front of him. Defendant's

belligerent tone and statements ridiculing the agents illustrate that he was not intimidated.

2. Defendant Waived his Right to Counsel

Even if the Court assumes that the agent's conduct constituted "interrogation," Defendant's statements are still admissible because Defendant knowingly and intelligently waived his right to counsel. In order to find that an accused validly waived his right to counsel, the Court must find that "the waiver was knowing and intelligent . . . under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with authorities." Edwards, 451 U.S. at 486 n.9. It is evident that Defendant understood his right to counsel, as he invoked this right even before Miranda warnings were read to him. After invoking his right to counsel and receiving Miranda warnings, Defendant made several unsolicited statements to the agents. Moreover, it was Defendant who initiated the subsequent exchanges and conversations with the agents by asking them questions about the evidence against him and the type of cooperation the Government was seeking. Thus, it is evident that Defendant's incriminating statements were the result of his own uncoerced choice to speak to the agents, and constitute a knowing and intelligent waiver of Defendant's Miranda rights. Therefore, the incriminating statements are admissible.

3. Defendant Never Invoked his Fifth Amendment Right to Remain Silent

Defendant's claim that the arresting agents violated his right to remain silent is without merit. Defendant was read his Miranda rights and informed of his right to remain silent at the outset of the car ride. However, Defendant never exercised his right to remain silent. Immediately after his Miranda rights were read to him, Defendant criticized Agent Gibbs's reading ability and told him in substance, that he "should be better at this." (Hr'g Tr. 10:22-11:2.) During the duration of the car ride, Defendant proceeded to make numerous, unsolicited remarks on a range of topics. Defendant was reminded by Agent Rivera of his right to remain silent and advised to exercise it, but Defendant continued to make unsolicited statements and ask the agents questions. Accordingly, the Court finds that Defendant never invoked his right to remain silent; therefore, his claim that the agents violated his Fifth Amendment right to remain silent must fail.

Moreover, even if Defendant had invoked his right to remain silent, he waived this right through the initiation of conversations with the agents and his multiple volunteered statements. In United States v. Montana, the Second Circuit found that a defendant's "initial unsolicited, inculpatory remark waived his right to remain silent . . . and subjected him

to permissible questioning." 958 F.2d 516, 519 (2d Cir. 1992). Similarly, in the case at bar Defendant's multiple unsolicited statements to the agents effectively waived his Fifth Amendment right to remain silent.

II. Defendant's Motion to Dismiss Count Two of the Superseding Indictment.

Defendant has moved to dismiss Count Two of the Superseding Indictment, which charges Defendant with aiding and abetting L&D's violation of Title 18, United States Code, Section 664.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions of the same offense." United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)). Federal Rule of Civil Procedure 7(c) governs the type of information that must be contained in an indictment and provides that "the indictment . . . shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." F. R. Crim. P. 7(c). "To be legally sufficient, an indictment 'need do little more than to track the language of the statute charged and state the time and place . . . of the alleged crime."

United States v. Orefice, No. 98 Cr. 1295, 1999 WL 349701, at *4 (S.D.N.Y. May 27, 1999) (quoting United States v. Grossman, 843 F.2d 78, 84 (2d Cir. 1988)).

The text of Title 18, United States Code, Section 664, provides, in relevant part, that:

> [a]ny person who embezzles, steals, or lawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, [shall be guilty of a crime.]

18 U.S.C. § 664.

Defendant challenges the legal sufficiency of Count Two on the ground that L&D's failure to remit contributions to the employee benefit funds could not constitute embezzlement of plan "assets" for purposes of criminal liability under Section 664 because the underlying agreements between L&D and the union provide that contributions do not become "assets" of the plan until they are received. (Def.'s Mem. at 8-9 (citing Article III, Section 1 of the Plan Documents)). In other words, because the monies owed to the plan were never received, they were not "assets" under Section 664, and by extension, Annucci could not have aided or abetted a violation of Section 664.

The very argument that Defendant is advancing was rejected by the Second Circuit in United States v. LaBarbara, 129 F.3d 81, 88 (2d Cir. 1997). LaBarbara was convicted of aiding and

abetting in violation of 18 U.S.C. § 664. LaBarbara challenged his conviction on the ground that the monies owed to the benefit funds were not "assets" until banked. Id. The Second Circuit rejected this argument and held that "[o]nce wages were paid to [the union members], [the contractor] had an obligation to the Funds that constituted 'assets' of the funds by any common definition." Id. In addition, the court stated that "LaBarbara's accepting kickbacks in return for allowing [the contractor] to avoid its obligations to the Funds was the functional equivalent, of and more harmful than, stealing directly from the Fund's bank accounts." Id.

The Court recognizes that LaBarbara's holding has not been universally followed in other circuits, and courts are divided about how and when employer contributions become plan assets for ERISA purposes. See United States v. Whiting, 471 F.3d 792 (7th Cir. 2007) (finding "in line" with LaBarbara that unremitted employee contributions can be plan assets for purposes of § 664); United States v. Grizzle, 933 F.2d 943 (11th Cir. 1991) (unpaid employee contributions subject to embezzlement by employer in violation of § 664); United States v. Jackson, No. 04 Cr. 70118, 2006 WL 1587457, at *6 (W.D. Va. June 7, 2006) (noting that Section 664 does not refer exclusively to plan "assets," but addresses the conversion of "any moneys, funds, securities premiums, credits, property or other assets" of a

plan and "the use of the word 'credit' indicates that Section 664 reaches beyond those funds actually in a plan account"). But see ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013-14 (11th Cir. 2003) (in civil ERISA suit, holding that paid unpaid employer contributions to a benefit plan are not plan assets unless the agreement between the employer and the fund specifically declares otherwise); Cline v. Indus. Maintenance Eng'g & Contracting, 200 F.3d 1223, 1234 (9th Cir. 2000) (contributions do not become plan assets until employer pays contributions to plan). But LaBarbara is binding precedent in this Circuit and the Court does not find a reason to depart from its holding. Accordingly, Defendant's motion to dismiss Count Two of the Superseding Indictment is denied.

Conclusion

For the foregoing reasons, Defendant's motion to suppress his post-arrest statement is DENIED; Defendant's motion to dismiss Count Two of the Superseding Indictment is DENIED.

The parties are directed to contact chambers to schedule the next conference.

SO ORDERED:

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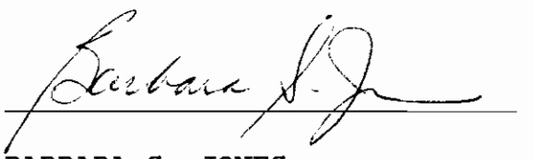
SO ORDERED:



BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 26, 2007